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No. 83-1190

In The
Supreme Court of the United States
October Term, 1983

ATHENS LUMBER COMPANY, INCORPORATED, et al.,
Appellants,

vs.

FEDERAL ELECTION COMMISSION, et al.,
Appellees.

On Appeal from the United States Court of Appeals For the Eleventh Circuit

APPELLANTS' REPLY BRIEF TO MOTION TO DISMISS OR AFFIRM

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APPELLANTS' REPLY IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

On February 22, 1984, appellee Federal Election Commission ("FEC") moved to dismiss this appeal or, in the alternative, to affirm the decision below. Appellants Athens Lumber Company, Incorporated, and John B. Bondurant submit this Reply Brief pursuant to Sup. Ct. R. 16.5 in opposition to the Motion.

STATEMENT OF THE CASE

This appeal arises from a decision on the merits by the United States Court of Appeals for the Eleventh Circuit *en banc* in an action challenging the constitutionality of a Federal Election Campaign Act ("FECA") provision brought under 2 U.S.C. § 437h. Appellants raise a facial challenge to the constitutionality of 2 U.S.C. § 441b(a), the FECA prohibition on campaign contributions and expenditures by corporations. The *en banc* court's decision on the merits is reviewable by this Court pursuant to § 437h(b).

———o———

ARGUMENT

The FEC has moved to dismiss the appeal on the curious tripartite theory that:

(1) the district court's erroneous failure to certify this case to the *en banc* court stands as an unfulfilled jurisdictional prerequisite;

(2) the *en banc* court's decision to review the constitutional questions submitted by the panel under its Fed. R. App. P. 35 discretion defeats this Court's § 437h jurisdiction; and

(3) the Court's dismissal of a § 437h appeal in *FEC v. Lance* controls this appeal.

1. The district court's failure to certify this case to the en banc court does not defeat this Court's jurisdiction.

This case was filed in July, 1981 in the United States District Court for the Middle District of Georgia under § 437h, the extraordinary provision Congress enacted to permit swift judicial review of the constitutionally controversial Federal Election Campaign Act. Section 437h(a) mandates that "[t]he district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting *en banc*." The district court failed to certify the questions raised in this case because it determined, erroneously, that the Appellants lacked Article III standing. J.S. App. C, at 48.

In October, 1982, an Eleventh Circuit panel corrected the district court's error. The panel held that appellant Bondurant was entitled to invoke the § 437h expedited review process and submitted the eight constitutional questions he raised directly to the *en banc* Court of Appeals for the Eleventh Circuit.

The panel expressly considered and rejected the pointless, time-consuming exercise of remanding this case for the formality of district court certification. J.S. App. B, at 22-23. The panel's decision was plainly influenced by a concern that the statutory mandate to expedite §437h matters "to the greatest possible extent" had already been frustrated by the lengthy delay caused by the district court's mistaken dismissal of this action. *Id.*, citing 2 U.S.C. § 437h(c).

In bypassing a remand for district court certification, the Eleventh Circuit panel properly noted that:

> [T]he facts necessary to resolve the issues raised by appellants are legislative as opposed to adjudicative. As such they are as easily presented to the court of appeals *en banc* as to the district court.
> J.S. App. B, at 22.

As the panel correctly determined, this case falls within that class of FECA cases which do not require the development of a factual record in district court because (a) the appellants challenge the statute on its face; (b) statutory interpretation cannot remove the need for a resolution of the constitutional questions; and (c) and the issues raised are neither insubstantial nor settled. *California Medical Association v. FEC,* 453 U.S. 182, 193-94 n.14 (1981).

Therefore, the district court's failure to certify the constitutional questions raised in this case has absolutely no bearing on this Court's appellate jurisdiction to review the *en banc* court's decision on the merits under § 437h.

2. The en banc court's decision to reach the merits of this case under Fed. R. App. P. 35 does not defeat this Court's § 437h jurisdiction.

Upon receiving the constitutional issues submitted by the panel, the *en banc* Court of Appeals for the Eleventh Circuit voted to hear the case pursuant to its discretion under Fed. R. App. P. 35. FEC's Motion to Dismiss, App. A, at 1a. The *en banc* court's February 7, 1983 Order undoubtedly had the effect of vacating the panel's opinion. The Order did not, however, invalidate the panel's deter-

mination that this case presented an FECA challenge properly before the Court under § 437h. In fact, the *en banc* court's subsequent decision (J.S. App. A) adopting the panel's analysis of the Article III standing issue and deciding the constitutional issues on the merits confirms the panel's determination that this is a proper §437h case.

This action was filed by a registered voter within the special class of litigants eligible to bring § 437h actions. The *en banc* court reviewed and confirmed his Article III standing and adjudicated his constitutional claims *on the merits*. Thus, the *en banc* court's Rule 35 disclaimer aside, it is plain that this case was entitled to expedited review under § 437h by the Court of Appeals sitting *en banc*. It is equally plain that the decision below ruling on the appellants' constitutional challenge is now properly before this Court on appeal under § 437h(b).

When a federal court is confronted with an Article III case or controversy brought under a statute expressly conferring jurisdiction, an affirmative obligation arises to discharge the judicial function and resolve the dispute. *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909). Chief Justice Marshall described the Court's role in this fashion:

> We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do, is to exercise our best judgment, and conscientiously to perform our duty. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

In this case, the Court's duty should be discharged by noting jurisdiction and hearing the appeal.

3. The dismissal of the appeal in Lance does not control this appeal.

FEC v. Lance, 453 U.S. 917 (1981), does not control this appeal because of a critical factual distinction. In *Lance,* the constitutional challenge to § 441b(a) arose in an FEC subpoena enforcement action brought to compel Mr. Lance's attendance at a deposition and document production. The procedural posture in *Lance* corresponded to this case to the extent that the *en banc* court reviewed the FECA issue on submission from a circuit panel under Rule 35 discretion rather than § 437h jurisdiction.

In *Lance,* however, during the six month interval between the *en banc* court's decision and this Court's dismissal of the appeal, Mr. Lance submitted to deposition because he was denied a stay of the order enforcing the subpoena. When Mr. Lance complied with the subpoena, his challenge to the constitutionality of the statute under which the subpoena issued was arguably mooted.

Thus, in *Lance,* an intervening termination of the controversy over subpoena enforcement may have defeated jurisdiction. Here, the controversy remains vibrant and there is no intervening development undercutting the jurisdictional duty imposed by § 437h.

CONCLUSION

For the foregoing reasons, this appeal is properly before the Court under § 437h and the FEC's Motion to Dismiss or Affirm should be denied.

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